STATE OF MICHIGAN

COURT OF APPEALS

MABEL EDGAR, Plaintiff-Appellant,	UNPUBLISHED August 9, 2005
v	No. 253356 Ingham Circuit Court
ALBERT FLOREY, Defendant-Appellee.	LC No. 03-000477-NO

Before: Whitbeck, C.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiff Mabel Edgar appeals as of right from a trial court order granting defendant Albert Florey's motion for summary disposition under MCR 2.116(C)(10) in this premises liability action. We affirm. We decide this case without oral argument under MCR 7.214(E).

I. Basic Facts And Procedural History

While visiting Florey's home for a psychic reading, Edgar fell as she walked from the living room to an area Florey calls his TV room. The floor of Florey's living room is elevated several inches above the floor of the TV room. No doorway separates the two areas of Florey's home, but an opening is framed in part by two short railings that run along the step that separates the two rooms. Florey filed a motion for summary disposition, alleging that the step was open and obvious and that the alleged dangerous condition had no special aspects that would remove it from the open and obvious doctrine. The trial court agreed, and granted Florey's motion.

II. Summary Disposition

A. Standard Of Review

We review de novo a trial court's decision on a motion for summary disposition.[1]

[1] *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

B. Legal Standards

We consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence the parties submit in the light most favorable to the nonmoving party.[2] A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds could differ.[3] When the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law.[4]

C. The Open And Obvious Doctrine

Edgar was a business invitee on Florey's property.[5] A landowner owes a duty to an invitee to exercise reasonable care to protect an invitee from unreasonable risk of harm caused by a dangerous condition on the land.[6] However, this duty does not encompass open and obvious dangers unless special aspects of the condition make the risk unreasonably dangerous.[7] An alleged dangerous condition is open and obvious if an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection.[8]

We agree with the trial court that the danger posed by the step into the sunken TV room was open and obvious. The Michigan Supreme Court has noted that "because the danger of tripping and falling on a step is generally open and obvious, the failure to warn theory cannot establish liability."[9] Edgar contends that because the different carpets in the living room and the TV room appeared to be the same color, especially under the lighting conditions, the step was not open and obvious and a jury question exists on whether Florey should have warned Edgar of the existence of the step. As to the lighting conditions at the time of Edgar's fall, Edgar testified that it was a sunny day and that light was coming through an uncovered window located a short distance away in the TV room. There appeared to be enough light for Edgar to observe furniture and a lamp located in the room. Regarding the color of the carpet, deposition photographs show that the carpets were not the same color and that an ordinarily prudent person would be able to discern the difference. As with the variation in color, the above mentioned railings and the relative positioning of the furniture in the TV room would ordinarily cue an average observer

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[2] *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

[3] *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

[4] *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

[5] See *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 598-599; 614 NW2d 88 (2000).

[6] *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001).

[7] *Id*.

[8] *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002).

[9] *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995).

that a person would need to step down into the TV room. The fact that Edgar did not see the step does not establish liability on the part of Florey.[10]

Further, there are no special aspects of the step that make the risk of harm unreasonable. In *Lugo*, the Court noted that an "open and obvious condition might be unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm."[11] The record before us establishes that the step was not unavoidable in light of the fact that Edgar was not compelled to cross into the TV room, nor did it create an unreasonable risk of death or serious bodily harm.[12]

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald

[10] *Id*. at 621.

[11] *Lugo, supra* at 517.

[12] *Id*. at 518-520.